



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 15, 1998

Mr. Steve Aragón
General Counsel
Texas Health and Human
Services Commission
P.O. Box 13247
Austin, Texas 78711

OR98-0968

Dear Mr. Aragón:

You ask this office to revise our ruling in Open Records Letter No. 98-0064 (1998). Your request was assigned ID# 113937. You received a subsequent request for some of the same information at issue in Open Records Letter No. 98-0064 (1998). That request was assigned ID# 115748.

The Texas Health and Human Services Commission (the "commission") received requests for specific proposals submitted to the commission to provide a "Medicaid Fraud and Abuse Detection System" for the State of Texas. In Open Records Letter No. 98-0064 (1998), this office concluded that the commission could withhold the requested proposals under section 552.104 of the Government Code, provided that a competitive bidding situation existed at the time the ruling was issued. You have informed this office that the commission has awarded a contract in this matter, and, therefore, request that we determine whether section 552.110 excepts the information from required public disclosure.

Because their property rights may be implicated by the release of the requested information, this office notified the four companies that submitted proposals: Deloitte & Touche Consulting Group, L.L.C. ("Deloitte & Touche"), Medstat Group, Inc. ("Medstat"), Electronic Data Systems Corporation ("EDS"), and Digital Equipment Corporation ("DEC"). See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. DEC did not respond to our notification.

Thus, we assume DEC has no property or privacy interest in the information. We have no basis to conclude the information about this company is excepted from required public disclosure and conclude it must be released.

Deloitte & Touche, EDS, and Medstat responded to our notification, asserting that several portions of their proposals are excepted from disclosure by section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). To establish that the public release of information is likely to cause substantial competitive harm, a business must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. See Open Records Decision No. 639 (1996) at 4 (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397 (5th Cir.), cert. denied, 471 U.S. 1137 (1985)).

We have reviewed Deloitte & Touche, EDS, and Medstat's arguments for withholding various portions of their proposals. We generally agree that section 552.110 excepts from disclosure most of the information each company wishes to withhold. We do not believe, however, that the general proposed costs for services fall within the Restatement definition of a trade secret. The cost proposals are not "a process or device for continuous use in the operation of the business;" rather, they contain information regarding a "single or ephemeral [event] in the conduct of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939) (defining trade secret as not encompassing information that relates to single event in the conduct of business); Open Records Decision No. 592 (1991); see Open Records Decision Nos. 319 (1982) at 3 (section 552.110 not applicable to pricing information in government contract), 306 (1982) at 3 (same).

Furthermore, we do not believe that the general costs associated with each proposal may be withheld as commercial or financial information under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. See Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); see generally Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government); see also Open Records Decision Nos. 541 (1990), 514 (1988). The public has an interest in knowing the terms that the commission negotiates with third parties for contracts of this nature. We conclude that the basic pricing terms of the proposals are not excepted from disclosure under section 552.110 as commercial or financial information or as trade secrets. The remaining information submitted by each of the three company's may be withheld. We have marked each of the proposals accordingly.

This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Loretta DeHay". The signature is fluid and cursive, with the first name "Loretta" being more prominent than the last name "DeHay".

Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 113937, ID# 115748

Enclosures: Marked documents under separate cover

cc: Mr. Phillip Poplin
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(w/o enclosures)